

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



February 11, 2003

TO: PARTIES OF RECORD IN CASE 02-03-011

This proceeding was filed on March 12, 2002, and is assigned to Commissioner Carl W. Wood and Administrative Law Judge (ALJ) Janice L. Grau. This is the decision of the Presiding Officer, ALJ Grau.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANGELA K. MINKIN  
Angela K. Minkin, Chief  
Administrative Law Judge

ANG:hkr



C.02-03-011 ALJ/JLG-POD/hkr

Attachment



**PRESIDING OFFICER'S DECISION (Mailed 2/11/2003)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Pac-West Telecomm, Inc.,

Complainant,

vs.

Pacific Bell Telephone Company,

Defendant.

Case 02-03-011  
(Filed March 12, 2002)

James M. Tobin, Mary E. Wand, Attorneys at Law,  
for Pac-West Telecomm, Inc., complainant.  
Stephanie E. Krapf, Attorney at Law, for Pacific Bell  
Telephone Company, defendant.

**OPINION RESOLVING COMPLAINT**

**Summary**

In today's decision, we find Pacific Bell Telephone Company (Pacific) incorrectly determined Pac-West Telecomm, Inc. (Pac-West) could not purchase special access circuits at the lower interexchange carrier point of termination rate and order Pacific to refund to Pac-West charges collected in excess of that rate.

**Procedural Background**

We held a prehearing conference on May 14, 2002, to establish the scope of this proceeding. An evidentiary hearing was held on August 5, 2002. Pac-West



presented two witnesses, John Sumpter and Rodney Wallin. Pacific also presented two witnesses, Michael Slater and Sandra Douglas. Opening and reply briefs were filed on September 19 and November 7, 2002, respectively. By an October 1, 2002, ALJ ruling, Pac-West's motion to set aside submission was granted, the accompanying Affidavit of John Sumpter was filed, and Pacific was granted leave to file a supplemental affidavit. Pacific filed the Declaration of Adam Nicholson on October 18, 2002, and this proceeding was deemed submitted on that date.

### **Factual Background**

The parties do not dispute the relevant facts. Pacific's special access tariff contains two rates for DS-1 circuit channel terminations, depending on the point of termination. One rate, \$165.94, applies to circuits terminating at an end-user location (TMECS rate); and the other, \$71.12, applies to circuits terminating at an IC (interexchange carrier) POT (point of termination) location (TMEPS rate). Pac-West purchased DS-1 circuits at the lower TMEPS rate for more than six years. Pacific no longer sells these circuits to Pac-West at that rate, which led to this complaint.

### **Parties' Contentions**

Pac-West alleges that Pacific overcharges it for 1.544Mbps/DS-1 circuits, special access circuits used to connect Pac-West switch locations with other Pac-West and Pacific facilities in order to provide competitive telecommunications services. Since April 2001, Pacific has refused to charge Pac-West the TMEPS rate and instead has charged the higher TMECS rate. Pac-West requests a refund of and credit for the excess charges and an order directing Pacific to correctly charge Pac-West for special access circuits.



Pacific contends that the TMECS rate is the applicable rate for the 1.544Mbps/DS-1 circuits ordered by Pac-West. Pacific contends that the tariff rates apply to the termination location and denies that Pac-West's circuits terminate at locations that are entitled to the TMEPS rate. Pacific states Pac-West is not entitled to the requested relief.

## **Discussion**

The sole issue in this proceeding is whether the 1.544 Mbps/DS-1 circuits ordered by Pac-West should be priced at Pacific's TMEPS or TMECS tariffed rate. We find that Pac-West is eligible for the TMEPS rate.

Pacific's Schedule Cal. P.U.C. No 175-T 7.5.8(C)(1) for high capacity digital special access services provides two monthly channel termination rates per point of termination for DS-1 1.544Mbps Service—the TMECS rate at an end-user location<sup>1</sup> and the TMEPS rate at an IC<sup>2</sup> POT location.

Pacific's tariff defines POT, a point of termination, as:

The point of demarcation, within a premises at which the Utility's responsibility for the provisioning of service ends.

In interpreting tariffs, the Commission has held that the tariff language must be construed as a whole, and should be given a fair and reasonable

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<sup>1</sup> Pacific's tariff defines an end-user as any customer that purchases intrastate telecommunications for its own use and not for the purpose of resale or sharing, and is not a carrier, except that a carrier shall be deemed to be an 'end-user' to the extent that such carrier uses telecommunications service for administrative purposes, without making such service available to others, directly or indirectly.

<sup>2</sup> Pacific's tariff defines IC or interexchange carrier as a corporation including resellers and enhanced service providers authorized by the California Public Utilities Commission to provide interLATA telecommunications services for its own use or the use of its customers.



construction that avoids absurd results or would render some part of the tariff a nullity. (*See* Decision (D.) 98-12-086, 1998 Cal. PUC LEXIS 1014, \*\*19-20.) Under the plain meaning of the tariff, the tariff provides two rates at two locations. Because one rate is at an IC POT location, a carrier such as Pac-West reasonably would believe it was eligible for the TMEPS rate.

Pac-West orders a DS-1 circuit from Pacific to a Pac-West location at or near Pac-West's customer's premise. That location is the site for Pac-West's equipment, including Channel Service Units (CSU), and the point of termination where Pacific terminates the circuit. Pac-West can serve multiple end-users with the capacity provided by the DS-1 circuit. Pac-West uses the DS-1 circuits in combination with other Pac-West provided transmission facilities and switching equipment to create the Pac-West network. Pac-West's DS-1 configuration corresponds to the configuration described in Pacific's Technical Publication, a configuration that corresponds to the TMEPS rate.

Pacific disagrees with Pac-West's characterization of its network and states that Pac-West's circuits terminate at Pac-West's end-user's locations and are subject to the TMECS rate. Pac-West's operations differ from Pacific's. Pac-West rents DS-1 circuits from Pacific and alters those circuits to create a unique resale environment that is not part of Pacific's network. Pac-West then uses its own equipment and facilities to connect to the facilities of its customers and the circuits provided by Pacific do not terminate at the customer's facilities. Thus Pacific terminates its circuits at the Pac-West's facilities, not at the end-user's. Schedule Cal. P.U.C. No 175-T 7.5.8(C)(1) charges \$71.12 monthly for channel termination at an IC POT location. Under a reasonable interpretation of Pacific's tariff, Pac-West is eligible for the lower TMEPS rate.

Pacific avers D.88-08-059 dictates the interpretation of Pacific's tariff. Pacific states the end-user to central office link would be priced at the same rate



whether provided by the local exchange carrier (LEC) to an end-user or whether provided by the LEC to a competitor as part of the access service connecting the competitor's network to the competitor's customer. (D.88-09-059, Appendix A, p. 9.) The distinction Pacific references, although found in the settlement agreement, is not contained in its tariff. Under the tariff a customer purchasing a DS-1 circuit finds a rate for an end-user location and a POT location. If the intended termination point is the purchasing carrier's facilities, that carrier would assume it could purchase the circuit at the TMEPS rate. However, we must determine whether we approved a different result.

D.88-08-059 approved a modified settlement agreement among a number of parties, including Pacific. Pac-West was not a party to the proceeding or the settlement agreement. In describing the settlement agreement, we stated it included restructured offerings that contained a common element for service from an end-user's premises to the local exchange carrier's central office and a distinct element for service from the interexchange carrier's point of presence (POP). (D.88-08-059, 29 CPUC 2d, 11, 42.) We adopted that portion of the settlement agreement. The settlement agreement, found in an appendix to the decision, contained the statement:

This element [IC/POP connection] will be priced at the same rate, whether provided by the LEC to an end user as part of the LEC's end-to-end intraLATA service or whether provided by the LEC to a competitor as part of the access service connecting the competitor's network to the competitor's customer. (*Id.* at Appendix A, p. 58.)

We did not discuss that portion of the settlement agreement in our decision adopting it. Although Pacific's interpretation of the settlement provision is a reasonable one and could have been the intent of the parties to the settlement agreement, we decline to impose it on Pac-West. Rule 51.8 of our



Rules of Practice and Procedure provides that our adoption of a settlement agreement is binding on all parties to the proceeding in which the settlement is proposed. Unless we provide otherwise, such adoption does not constitute approval of or precedent regarding any principle or issue in the proceeding or in any future proceeding. Because Pac-West was not a party to the settlement agreement and we did not discuss that provision or make it precedential, we cannot now do so.

Pacific also avers that our decision to price private lines and special access identically in D.94-09-065 is further support for its position that the TMECS rate should apply to Pac-West's DS-1 circuits. However, we did not endorse Pacific's interpretation of the tariff in D.94-09-065. We merely approved existing pricing and consolidated private line and special access services.

Pac-West can purchase DS-1 circuits at the TMEPS rate. Pacific incorrectly determined that Pac-West was not eligible for that rate. Pacific shall refund to Pac-West charges in excess of the TMEPS rate paid by Pac-West and shall adjust all invoices to reflect the correct rate.

### **Assignment of Proceeding**

Carl Wood is the Assigned Commissioner and Janice Grau is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. Pacific's special access tariff contains two rates for DS-1 circuit channel terminations, depending on the point of termination. The TMECS rate, \$165.94 monthly, applies to circuits terminating at an end-user location. The TMEPS rate, \$71.12, applies to circuits terminating at an IC (interexchange carrier) POT (point of termination) location.



2. Pac-West purchased DS-1 circuits at the lower TMEPS rate for more than six years.

3. Pacific no longer sells DS-1 circuits to Pac-West at the TMEPS rate.

4. Pacific entered into a settlement agreement that created two special access elements. Pac-West was not a party to that settlement agreement.

### **Conclusions of Law**

1. In interpreting tariffs, the tariff language must be construed as a whole and should be given a fair and reasonable construction that avoids absurd results or would render some part of the tariff a nullity.

2. Schedule Cal. P.U.C. No 175-T 7.5.8(C)(1) for high capacity digital special access services permits customers such as Pac-West to purchase DS-1 1.544 Mbps service at the TMEPS rate for circuits terminating at Pac-West's facilities.

3. Pac-West is entitled to a refund for charges in excess of the TMEPS rate.

4. It is reasonable to make this order effective today in order to ensure Pacific charges Pac-West rates consistent with Pacific's approved tariffs.

## **O R D E R**

### **IT IS ORDERED** that:

1. The complaint of Pac-West Telecomm Inc. (Pac-West) is granted insofar as it requests that Pacific Bell Telephone Company (Pacific) charge Pac-West rates consistent with Pacific's approved tariffs, as set forth in this opinion. The complaint is otherwise denied.

2. Pacific shall refund to Pac-West charges for DS-1 circuits in excess of the TMEPS rate.

3. This proceeding is closed.

This order is effective today.



Dated \_\_\_\_\_, at San Francisco, California.